Supreme Court, U.S.
FILED
JUN 6 1995
OFFICE OF THE CLERK

No. 94 -- 1834

In The

Supreme Court of the United States

October Term, 1995

HARVEY M. ALPER, HENRY P. TRAWICK, JR., AND JOSEPH W. LITTLE,

Petitioners,

vs.

THE STATE OF FLORIDA (THE FLORIDA BAR),

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Florida

---

PETITIONERS' REPLY BRIEF

JOSEPH W. LITTLE
Counsel of Record *
3731 N.W. 13th Place
Gainesville, Florida 32605
(904) 392-2219
Attorney for Petitioners

BEST AVAILABLE COPY

ARGUMENT

In the brief in opposition to the petition, the State of Florida argues that this Court should exercise its discretion to decline to grant the petition -- merely because the Florida Supreme Court declined to issue a written opinion explaining its reasons for denying relief in the proceeding below. This is new matter that boldly highlights the stranglehold the State exercises over the Petitioners' first amendment rights.

Petitioners' core complaint is that the State of Florida requires them to be named members of The Florida Bar, which is an agency of the Supreme Court of Florida, while authorizing and permitting The Florida Bar to promote the retention elections of the justices of The Florida Supreme Court, which "merit retention" reelections Petitioners' consistently oppose as a matter of principle. Furthermore, the State funds this promotion of

the justices' reelections from the mandatory dues the State imposes upon Petitioners as a condition of exercising the right to practice law. In addition, the State provides no mechanism to obtain a rebate from mandated dues to reimburse Petitioners for their share of the State's expenditures to promote merit retention elections of justices and judges. Finally, and most egregiously, as the State admits in its Brief in Opposition (p.p.5,6), the State has decreed that the Supreme Court of Florida is the sole agency of state government in which Petitioners must seek relief against unconstitutional conditions placed upon them by the political activities of The Florida Bar. See also, *The Florida Bar re Schwarz*, 552 So.2d 1094 (Fla. 1989).

In short, the argument of the State in opposition invites this Court to tighten the noose around the neck of Petitioners' constitutional rights. The State, through the Supreme Court of Florida, sets the limits on political

activities of its agent, The Florida Bar. The State also reserves to the Supreme Court of Florida the exclusive jurisdiction to review constitutional challenges to the political activities of the Florida Bar, including those pertaining to the elections of individual justices and judges. The State now suggests that it may isolate its judicial decisions from the review of this Court by the simple step of refusing to issue a written opinion when it denies petitions for relief from first amendment violations. This plainly demonstrates that the State is engaged in the kind of political activities that *Keller* suggests may violate the first amendment rights of compelled members in a mandatory bar.

Petitioners attached several exhibits to the initial petition reproducing *verbatim* the content of documents that the State, through The Florida Bar, widely distributed to promote the retention elections of justices of the Supreme Court of Florida and judges of the district court

of appeals. See Petition, Appendix B, Exhibits 2-6, 12, pp 15a-37a. To augment those exhibits, Petitioners attach hereto a verbatim copy of the content of promotional materials widely distributed by The Florida Bar to promote the retention elections of specific justices of the very court that denied relief to Petitioners in this case without opinion. These exhibits make plain that the State is involved in political activities entirely different in kind from those considered by this Court in *Keller* and that the State does not provide Petitioners an independent forum to protect their constitutional rights.

In short, Petitioners respectfully submit that this case squarely raises vital first amendment issues left open by *Keller* and needs the immediate review of this Court.

Respectfully submitted,

Joseph W. Little
Submitted on behalf of Petitioners
3731 N.W. 13th Place
Gainesville, FL 32601

APPENDIX A - EXHIBIT 1 *

SUPREME COURT OF FLORIDA
Statewide Jurisdiction

INTRODUCTION

Merit retention is a unique voting process that offers regular citizen review of our state's higher level judges, intended to keep quality individualson our state's higher level judges, intended to keep quality individuals on Florida's Supreme Court and five districtcourts of appeal. Since 1976 our State Constitution has required that these appellate court judges appear on the nonpartisan portion of the general election ballot for periodic voter approval of their continuation in office.

As part of that process, the November 8 elections will include - for consideration by every voter regardless of

---

* This is a copy of a document produced and widely distributed by The Florida Bar in connection with 1994 judicialelections in Florida. [Footnote added by Petitioners for identification].

political party affiliation - the names of the chief justice and one other justice of the Florida Supreme Court, plus judges from a regional district court of appeal.

These appellate-level judges attain their offices through a "merit selection" system: a thorough public examination of their qualifications by a distinguished citizen commission that recommends them and other nominees for gubernatorial appointment. "Merit retention: complements that process, allowing voters a subsequent qualitative review of judicial performance - and the reconfirmation of each individual deemed worthy for further service on the bench.

In a merit retention campaign appellate judges face no opposing candidates; individual judges from the same court are not running against one another. Ballot language merely asks citizens to vote "Yes" or "No" on the question of whether each incumbent should be retained on a particular multi-member appellate court. Judges

receiving a majority of "Yes" votes may continue in office for another six-year term. If the "No" votes prevail for any individual, their position is declared vacant and is again filled through the merit selection process.

The appearance of these judges' names on the ballot implies nothing negative in their record - it is significant only because of Florida's special constitutional assurance of regular citizen approval of their continued judicial service. In fact, without some formalized opposition to their retention, appellate judges are forbidden by ethical rules to conduct any traditional campaign activity (unlike trial-level judges who may face opposition yet still run as nonpartisan candidates).

A truly responsible merit retention vote includes consideration of an appellate judge's legal ability, their knowledge of the law, integrity, temperament, reputation within the legal community, impartiality, freedom from bias or prejudice, demeanor, and courtesy. Ideally,

citizens need only verify that a judge is soundly interpreting the law, that their character is flawless, and their dispensation of justice is fair. Bar association polls, media endorsements and the recommendations of respected opinion leaders are additional indicators of a judge's true merit for retention in office.

STEPHEN H. GRIMES

BIRTHDATE: November 17, 1927
BIRTHPLACE: Peoria, Illinois
SPOUSE: Fay Fulghum Grimes
CHILDREN: Four
DEGREES: University of Florida, B.S., B.A. 1950; University of Florida J.D., 1954; Stetson University, Doctor of Laws (honorary), 1980.
LEGAL OFFICES & POSITIONS: Practiced law with Holland & Knight, 1954-73; Judge, Second District Court of Appeal, 1973-87 (Chief Judge, 1978-80); Justice, Supreme Court of Florida, 1987-present (Chief Justice, 1994-present).
BAR OFFICES & ACTIVITIES: Member of The Florida Bar, American Bar Association, Tenth Judicial Circuit Bar Association (President, 1966); Florida Bar Appellate Rules Committee, 1974-77, 1984-87 (Vice Chair, 1976); Supreme Court Appellate Structure Commission, 1979; Florida Council on Criminal Justice, 1979-82; Supreme Court

Committee on Florida Standard Jury Instructions in Criminal Cases, 1977-87 (Chair, 1985-87); Florida Bar Tort Litigation Review Commission, 1985; Supreme Court's Restructure commission 1985-86; Chair, Judicial Council of Florida 1989-94; Article V Task Force 1994-present.
OTHER CIVIC ACTIVITIES: U.S. Navy 1951-53; District Governor of Rotary International, 1960-61; President of greater Bartow Chamber of Commerce, 1964; Director of Bartow Memorial Hospital, 1957-60; Board of Trustees of Polk Community College, 1967-70 (Chair, 1969); Board of Directors of Bartow Public Library, 1968-78; Board of Governors of Polk Public Museum, 1978-present; former Vice Counsel of Episcopal Diocese of Central Florida.
HONORS & AWARDS: Chair of Florida Conference of District Court of Appeal Judges, 1978-80; Judicial Fellow American College of Trial Lawyers; Who's Who in America, 1970-present.
PUBLICATIONS: Editor-in-Chief, University of Florida Law Review (1951).

GERALD KOGAN

BIRTHDATE: May 23, 1933
BIRTHPLACE: New York, New York
SPOUSE: Irene Vulgan Kogan
CHILDREN: Three, 4 Grandchildren
DEGREES: University of Miami, B.B.A. and J.D. 1955
LEGAL OFFICES & POSITIONS: Assistant State Attorney, Eleventh Judicial Circuit, 1960-67 (Chief Prosecutor

Homicide and Capital Crimes Division, 1964-67); Special Counsel, Florida Legislature's Select Committee on Organized Crime and Law Enforcement, 1968-69; Circuit Court Judge, Eleventh Judicial Circuit of Florida, 1980-87 (Administrative Judge, Criminal Division, 1984-87); Justice, Supreme Court of Florida, 1987 to present (Chair, Supreme Court of Florida 1987-present (Chair, Supreme Court Gender Bias Study Commission, 1987-present); Vice-Chair Bench/Bar Commission and Chair Bench Bar Implementation Committee.

BAR OFFICES & ACTIVITIES: Special Prosecutor and Referee in Florida Bar Disciplinary Pro-Florida Bar Committees - Grievance Committee, Eleventh Judicial Circuit; Unauthorized Practice of Law Committee; Dade County Bar Association Criminal Court Committee.

OTHER CIVIC ACTIVITIES: Faculty Member, American Academy of Judicial Education, 1981-present; Former Adjunct Faculty Member of University of Miami School of Law and Nova University Center for the Study of Law; Faculty of the Trial Judges Academy at University of Virginia, 1986; Teaches Trial Advocacy Programs at University of Florida School of Law for Prosecutors and Public Defenders; Adjunct Faculty - FSU School of Law.

HONORS & AWARDS: Selig I. Goldin Award, 1988.